Supreme Court, U. S.
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No. 80-386

IN THE

Supreme Court of the United States

October Term, 1980

AMERICAN JEWISH CONGRESS and
MARTIN HOCHBAUM,

Petitioners,

v.

NEW YORK STATE HUMAN RIGHTS APPEAL BOARD, NEW YORK STATE DIVISION OF HUMAN RIGHTS, UNITED ARAB EMIRATES, THE CULTURAL DIVISION OF THE EMBASSY OF THE UNITED ARAB EMIRATES, and THE UNITED ARAB EMIRATES UNIVERSITY,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE APPELLATE DIVISION, FIRST DEPARTMENT, OF THE STATE OF NEW YORK

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QUESTION PRESENTED

Does the Foreign Sovereign Immunities Act of 1976 (P.L. 94-538; 28 U.S.C. Section 1602 et seq.), bar a state administrative agency from acting on a complaint alleging that a foreign nation, its embassy and a university operated by the foreign nation has violated a state law by circulating, in the state, an application for employment on the teaching staff of the foreign university which required the disclosure of the applicant's religion?

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PETITION FOR A WRIT OF CERTIORARI TO THE APPELLATE DIVISION, FIRST DEPARTMENT, OF THE STATE OF NEW YORK

Petitioners, American Jewish Congress and Martin Hochbaum, respectfully pray that a Writ of Certiorari issue to review the judgment of the Appellate Division, First Department, of the State of New York confirming the dismissal by the

New York State Human Rights Appeal Board of a complaint filed by petitioners against respondents, United Arab Emirates, The Cultural Division of the Embassy of the United Arab Emirates and the United Arab Emirates University.

JUDGMENTS BELOW

The judgment of the Appellate Division, reported at 73 App. Div. 2d 881 (1950), and the rulings of the Appeal Board and the State Division of Human Rights appear in the Appendix hereto. The judgment of the New York Court of Appeals denying the motion for leave to appeal also appears in the Appendix. No opinion was rendered by any of these bodies, and none of these judgments, except that of the Appellate Division, has been reported.

JURISDICTION

The judgment of the Court of Appeals of the State of New York denying the motion for leave to appeal was entered on June 12, 1980. This Court's jurisdiction is invoked pursuant to 28 U.S.C. § 1257(3).

STATUTORY PROVISIONS INVOLVED

Title 28 U.S.C. § 1602 (Supp. 1980) provides:

> The Congress finds that the determination by United States courts of the claims of foreign states to immunity from the jurisdiction of such courts would serve the interests of justice and would protect the rights of both foreign states and litigants in United States courts. Under international law, states are not immune from the jurisdiction of foreign courts insofar as their commercial activities are concerned, and their commercial property may be levied upon for the satisfaction of judgments rendered against them in connection with their commercial activities. Claims of foreign states to immunity should henceforth be decided

by courts of the United States and of the States in conformity with the principles set forth in this chapter.

Title 28 U.S.C. § 1603 (Supp. 1980) provides:

> (a) A "foreign state", except as used in section 1608 of this title, includes a political subdivision of a foreign state or an agency or instrumentality of a foreign state as defined in subsection (b).
>
> (b) An "agency or instrumentality of a foreign state" means any entity --
>
> > (1) which is a separate legal person, corporate or otherwise, and
> >
> > (2) which is an organ of a foreign state or political subdivision thereof, or a majority of whose shares or other ownership interest is owned by a foreign state or political subdivision thereof, and
> >
> > (3) which is neither a citizen of a State of the United States as defined in section 1332(c) and (d) of this title, nor created under the laws of any third country.
>
> * * *

(d) A "commercial activity" means either a regular course of commercial conduct or a particular commercial transaction or act. The commercial character of an activity shall be determined by reference to the nature of the course of conduct or particular transaction or act, rather than by reference to its purpose.

(e) A "commercial activity carried on in the United States by a foreign state" means commercial activity carried on by such state and having substantial contact with the United States.

Title 28 U.S.C. § 1605(a)(2) provides:

(a) A foreign state shall not be immune from the jurisdiction of courts of the United States or of the States in any case --

* * * *

(2) in which the action is based upon a commercial activity carried on in the United States by the foreign state; or upon an act performed in the United States in connection with a commercial activity of the foreign state elsewhere; or upon an act outside the territory of the United States in connection with a commercial activity of the foreign state elsewhere and that act causes a direct effect in the United States;

New York State Executive Law § 296(1)(d) provides in part:

> 1. It shall be an unlawful discriminatory practice:
>
> * * * *
>
> (d) For any employer or employment agency to print or circulate or cause to be printed or circulated any statement, advertisement or publication, or to use any form of application for employment or to make any inquiry in connection with prospective employment, which expresses directly or indirectly, any limitation, specification or discrimination as to age, race, creed, color or national origin or sex, or any intent to make any such limitation, specification or discrimination, unless based upon a bona fide occupational qualification; ....

STATEMENT OF THE CASE

On May 12, 1978, Petitioners American Jewish Congress and Martin Hochbaum filed a verified complaint with the New York State Division of Human Rights ("Division") (Case No. Ia-E-C-6019-78 and Case No. E-C-58284-78), charging the

United Arab Emirates, the Cultural Division of the Embassy of the United Arab Emirates and United Arab Emirates University ("respondents") with an unlawful discriminatory practice related to employment, in violation of the Human Rights Law of the State of New York, Executive Law 296(1)(d). The complaint arose from the efforts of those respondents, through advertisements in The Wall Street Journal, to recruit faculty for the United Arab Emirates University. Complainant Hochbaum, a Jew and a resident of New York, requested an employment application form. Respondents sent him an application form which included a question about his religion. The complaint alleged that that practice was illegal.[1/] No

1/ The complaint alleged that the American Jewish Congress, a New York not-for-profit corporation, is a national membership organization of American Jews (par. 1) and that it is a person aggrieved by the unlawful discriminatory practice (par. 11). It is established that such an organization is entitled to file a complaint under

appearance was made in behalf of the respondents and no answers, motions or other documents were submitted in their behalf at any stage in this proceeding.

While the complaint was under consideration by the Division, petitioners learned that the Division had doubts about its jurisdiction because of the doctrine of sovereign immunity. Accordingly, petitioners submitted a legal memorandum on that subject, calling the Division's attention to the applicability of the Federal Foreign Sovereign Immunities Act of 1976 and

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Section 297(1)(a) of the New York Executive Law. National Organization of Women v. Gannett Co., Inc., 40 App. Div. 2d 107, reversed on other grounds 34 N.Y. 2d 416, 358 N.Y. Supp. 2d 124, 314 N.E. 2d 867 (1972); Glen Cove Municipal Civil Service Commission v. Glen Cove NAACP, 34 App. Div. 2d 956, 312 N.Y. Supp. 2d 400 (1970); American Jewish Congress v. Carter, 19 Misc. 2d 205, 23 Misc. 2d 466, 190 N.Y. Supp. 2d 218, mod. on other grounds, 10 App. Div. 2d 833, 199 N.Y. Supp. 2d 157, aff'd, 9 N.Y. 2d 223, 213 N.Y. Supp. 2d 60, 173 N.E. 2d 788 (1959).

urging that, under that statute, respondents were not immune from suit.

On June 11, 1979, the Division issued its Determination and Order after Investigation. It ordered that the complaint be dismissed, declaring, without elaboration, that it did not have jurisdiction over the matter because "[t]he complaint ... is directed against a foreign state, its embassy and State-owned University not engaged in commercial activity within the United States."

On June 20, 1979, petitioners filed an appeal with the New York State Human Rights Appeal Board ("Appeal Board"). On August 7, 1979, the Appeal Board issued its order annulling the Division's order and dismissing the complaint on a procedural ground (no longer at issue) that the Division had failed to render a decision within a statutorily mandated 180-day period. (See Executive Law, Sec. 297.)

On August 27, 1979, petitioners filed a petition in the Appellate Division, First Department, seeking review of the orders of both the Division and the Appeal Board. By the time the case reached the Appellate Division, the state courts had made it clear, in a number of decisions, that the Appeal Board had erred on the procedural issue. Accordingly, on January 17, 1980, the Appellate Division decided the case "on the merits," that is, on the federal statutory sovereign immunity issue decided by the Division.[2/]

2/ The operative portion of its order read as follows:

> It is unanimously ordered that the determination of the State Human Rights Appeal Board be and the same hereby is confirmed, on the merits, without costs and without disbursements. See Matter of Callaghan v. New York State Division of Human Rights, A.D. 2d (1st Department, Oct. 1979).

The Callaghan case was one of the decisions on the procedural issue referred to in the text.

Petitioners duly filed an application for leave to appeal to the New York State Court of Appeals. The issue of sovereign immunity was the only issue presented to the Court of Appeals in this application. On June 12, 1980, the application was denied, without opinion.

REASONS FOR GRANTING THE WRIT

Petitioners submit that the ruling of the court below dealt erroneously with a question under the 1976 Immunities Act, a relatively new federal statute that has not yet been considered by this Court and on which the few lower court rulings that might be deemed relevant are in conflict. Its holding, that aggrieved persons may not sue foreign sovereigns to vindicate rights guaranteed by state anti-discrimination law under the circumstances presented here, is inconsistent with the purpose of the 1976 Act, which was to prevent the kind of embarrassment of our

government that flows from allowing agencies of foreign governments to operate in this country in violation of our laws.

This case arises out of a clear violation, by conduct in this country, of a New York State statute designed to curb a practice harmful to our society. The decision below would sanction continuation of such violations by the growing number of foreign government agencies engaged in non-governmental activities -- activities for which the classic doctrine of sovereign immunity was never intended.

We submit further that, if the decision below is not clearly wrong, it certainly is not clearly right. It deals with an issue that urgently requires plenary consideration by the courts -- and resolution in a form that will provide guidance in future litigation.

Origin and Purpose of the 1976 Act

The purpose of the 1976 codification of the law on sovereign immunity was made clear in President Gerald Ford's statement upon signing the bill into law.

> This statute will also make it easier for our citizens and foreign governments to turn to the courts to resolve ordinary legal disputes. In this respect, the Foreign Sovereign Immunities Act carries forward a modern and enlightened trend in international law. And it makes this development in the law available to all American citizens.

12 Weekly Comp. of Pres. Doc. 1554 (1976).

The "modern and enlightened trend" to which President Ford referred is the "restrictive doctrine" of foreign sovereign immunity codified in the Act. The basic premise of that doctrine is that, in what President Ford called "ordinary legal disputes," a foreign sovereign should not have available the defense of sovereign immunity. In essence, the doctrine "restricts the immunity of a foreign state to suits involving a foreign

state's public acts (acta jure imperii) and does not extend immunity to private acts (acta jure gestionis)." Von Mehren, The Foreign Sovereign Immunities Act of 1976, 17 Colum. J. Trans. L. 33, 33-34 (1978).

The events leading up to the codification of the restrictive theory of sovereign immunity are described in the House Committee Report which accompanied the bill (H. Rep. 94-1487, 94th Congress, 2d Sess., 1976, reprinted in 1976 Code, Congressional and Administrative News at 6604). It shows in some detail that, prior to 1976, the courts, both federal and state, deferred to rulings by the State Department as to whether an assertion of sovereign immunity should be honored in a particular case. If no guidance was given by the State Department, the courts applied whatever rules and policies they could deduce from prior State Department pronouncements.

It was found, however, that this practice was very unsatisfactory. The State Department was frequently subjected to political pressures in determining whether "a suggestion of immunity" should issue. There was a strong tendency to make immunity determinations on the basis of the state of relations with, and diplomatic power exercised by, the government seeking the suggestion.

In 1952, in an effort to reduce these pressures, the Department formally set forth its policy on immunity in the so-called "Tate Letter" (26 Department of State Bulletin 984-5 (1952)). That letter quite explicitly adopted the restrictive theory, stating: "the immunity of the sovereign is recognized with regard to sovereign or public acts (jure imperii) of a state, but not with respect to private acts (jure gestionis)." Despite this action, diplomatic pressures continued and the State Department frequently wavered

in its application of the doctrine. In some cases, the State Department simply refused to give the courts any guidance, thereby leaving it up to them to make the decisions which were supposed to be made by the Executive Branch.

The 1976 Act embodied a decision by Congress that the responsibility should be transferred from the Executive Branch to the Judiciary. The Act is cast in general legal terms, clearly addressed to the courts, without reference to any positions that might be taken by the Secretary of State or any other agent of the Executive. After stating the general rule that foreign states are immune from suit in our courts (28 U.S.C. § 1604), it creates exceptions to that rule of sufficient breadth as to make it clear that no general grant of immunity is intended. The exception relevant here is that contained in 28 U.S.C. § 1605(a)(2), set forth in full above, which provides that a foreign state shall —

not be immune where "the action is based upon a commercial activity carried on in the United States ...; or upon an act performed within the United States in connection with a commercial activity of the foreign state elsewhere; ...." (Definitions of a number of the terms used in the Act are also set forth above.)

The House Report declares that a broad range of activities is encompassed within the scope of the phrase "commercial activity." Specifically mentioned among these is the recruitment of employees by a foreign government -- the very activity which gave rise to this complaint. The Report says (at p. 16):

> Commercial activity - Paragraph (c) of section 1603 defines the term "commercial activity" as including a broad spectrum of endeavor, from an individual commercial transaction or act to a regular course of commercial conduct. A "regular course of commercial conduct" includes the carrying on of a commercial enterprise such as a mineral extraction company, an airline or a state trading corporation. Certainly,

if an activity is customarily carried on for profit, its commercial nature could readily be assumed....

As the definition indicates, the fact that goods or services to be procured through a contract are to be used for a public purpose is irrelevant; it is the essentially commercial nature of an activity or transaction that is critical. Thus, a contract by a foreign government to buy provisions or equipment for its armed forces or to construct a government building constitutes a commercial activity. The same would be true of a contract to make repairs on an embassy building. Such contracts should be considered to be commercial contracts, even if their ultimate object is to further a public function.

By contrast, a foreign state's mere participation in a foreign assistance program administered by the Agency for International Development (AID) is an activity whose essential nature is public or governmental, and it would not itself constitute a commercial activity.... Also public or governmental and not commercial in nature, would be the employment of diplomatic, civil service, or military personnel, but not the employment of American citizens or third country nationals by the foreign state in the United States.

The courts would have a great deal of latitude in determining what is a

> "commercial activity" for purposes of this bill. It has seemed unwise to attempt an excessively precise definition of this term, even if that were practicable. Activities such as a foreign government's sale of a service or a product, its leasing of property, its borrowing of money, its employment or engagement of laborers, clerical staff or public relations or marketing agents, or its investment in a security of an American corporation, would be among those included within the definition. (Emphasis added)

The Report goes on to make three points clear. First, the Act was designed to give statutory status to the restrictive version of the immunity doctrine; the Report says (at p. 7):

> First, the bill would codify the so-called "restrictive" principle of sovereign immunity, as presently recognized in international law. Under this principle, the immunity of a foreign state is "restricted" to suits involving a foreign state's public acts (jure imperii) and does not extend to suits based on its commercial or private acts (jure gestionis). This principle was adopted by the Department of State in 1952 and has been followed by the courts and by the executive branch ever since. Moreoever, it is regularly applied against the United States in suits against the U.S. Government in foreign courts.

Thus, "[t]he Act was a codification of the [Tate] letter...." Sugarman v. Aeromexico, Inc., F. 2d (C.A. 3), decided March 21, 1980.

Second, the phrase "commercial activity," as used in the Act, covers all acts that are not jure imperii, without regard to whether the activity in question would be viewed as "commercial" in other contexts. This is shown by the use of the phrase, in the paragraph just quoted: "commercial or private acts (jure gestionis)." Von Mehren, supra, expresses the view (at p. 54) that "any act which can be done by an individual is juridically private and, when that act is done by the state, 'commercial'." In International Ass'n of Machinists v. Organization of Petroleum Exporting Countries, 477 F.Supp. 553, 567 (S.D. Cal. C.D. 1979), Judge Hauk applies the obverse of this formulation, saying that immunity is granted to activities "in which only a sovereign can engage."

Third, Congress intended that the decision as to whether the challenged act was public or private was to be made by the courts. The Committee said (at p. 7):

> Second, the bill would insure that this restrictive principle of immunity is applied in litigation before U.S. courts. ... A principal purpose of this bill is to transfer the determination of sovereign immunity from the executive branch to the judicial branch, thereby reducing the foreign policy implications of immunity determinations and assuring litigants that these often crucial decisions are made on purely legal grounds and under procedures that insure due process. The Department of State would be freed from pressures from foreign governments to recognize their immunity from suit and from any adverse consequences resulting from an unwillingness of the Department to support that immunity. As was brought out in the hearings on the bill, U.S. immunity practice would conform to the practice in virtually every other country--where sovereign immunity decisions are made exclusively by the courts and not by a foreign affairs agency.

Since the Act went into effect, lower courts as well as commentators have uniformly recognized this shift of responsibility to the judiciary.

Yessenin-Volpin v. Novosti Press Agency, 443 F. Supp. 849, 851 (S.D.N.Y. 1978); National American Corp. v. Federal Republic of Nigeria, 448 F.Supp. 622, 638 (S.D.N.Y. 1978); Jet Line Services v. M/V Manga El Hariga, 462 F.Supp. 1165, 1170 (D.C. Md. 1978); Behring International v. Imperial Iranian Air Force, 475 F.Supp. 383, 388 (D.C.N.J. 1978); von Mehren, supra, at p. 45; Note, The Foreign Sovereign Immunities Act of 1976: Giving the Plaintiff His Day in Court, 46 Ford. L. Rev. 543, 550 (1977). Judge Tenney, in the Yessenin case, stressed that "... a court faced with a claim of immunity from jurisdiction must engage ultimately in a close examination of the underlying cause of action in order to decide whether the plaintiff may obtain jurisdiction over the defendant." No such examination, close or otherwise, was made here.[3/]

3/ Prior to the 1976 enactment, an interpretation of the distinction between jure imperii and

Inconsistent Judicial Interpretation of the 1976 Act

The need for interpretation by this Court is shown by the fact that lower courts have not dealt consistently with sovereign immunity questions in cases involving employment. Relatively

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jure gestionis, as made in the Tate letter, was provided by the Second Circuit Court of Appeals in Victory Transport, Inc. v. Comisaria General de Abastecimientos y Transportes, 336 F.2d 254 (2d Cir. 1964), cert. denied, 381 U.S. 934 (1965). The court said (at 360) that the former category was limited to:

(1) internal administrative acts, such as expulsion of an alien,
(2) legislative acts, such as nationalization,
(3) acts concerning the armed forces,
(4) acts concerning diplomatic activity,
(5) public loans.

As von Mehren, supra, points out (at p. 54), the immunity granted by the 1976 Act is narrower. Yet, even under the Victory Transport formulation, the operation of a university and the hiring of personnel for that purpose would not have enjoyed sovereign immunity. Each of the five categories in that formulation deals with matters that must be handled by a government and only by a government. That is not true of the operation of a university.

few such cases have been decided and those few are in conflict.

Thus, in United Euram v. Union of Soviet Socialist Republics, 461 F.Supp. 609 (S.D.N.Y. 1978), the plaintiff sued the U.S.S.R., its Ministry of Culture, and the State Concert Society of the U.S.S.R., Gosconcert. The action was for breach of contracts under which Gosconcert was to send performing artists to the United States to give concerts organized by plaintiff, an impresario. Defendants claimed sovereign immunity, arguing that the contracts were signed pursuant to a U.S.-U.S.S.R. cultural exchange agreement and were therefore artistic and governmental, not commercial, in character. Plaintiff urged that the purpose of the contracts was irrelevant under the Act and that the contracts were "commercial" because they were agreements to trade services for cash. The court, focusing on the Act's

language and legislative history, rejected the claim of sovereign immunity.

In reaching that decision, the District Judge expressly disapproved the approach taken in Gittler v. German Information Center, 95 Misc. 2d 788, 408 N.Y. Supp. 2d 600 (S.Ct. Sp. Term, N.Y. City, Pt. I, 1978). In that case, the plaintiff, a widow and executrix of the estate of a decedent, sued to recover unpaid compensation and other benefits arising out of the decedent's employment by the German Information Center, a section of the Consulate General of the Federal Republic of Germany. The employment involved work on several documentary films designed to foster cultural relations and promote understanding between Germany and the United States. Because suit was instituted before the effective date of the 1976 Act, the issue of immunity was referred to the Department of State. The State Department suggested that the claim of sovereign

immunity be rejected, stating that the employment of an individual to perform services in connection with a public relations function is not a uniquely governmental activity and partakes more of the nature of a commercial or private transaction. The State Department's suggestion, however, was made after the effective date of the Act, and the court therefore declined to be bound by it. It went on to uphold the claim of sovereign immunity, deeming the activity giving rise to the suit "diplomatic activity." Compare Broadbent v. Organization of American States, No. 78-1465, D.C. Cir. Jan. 8, 1980), in which the court held that the 1976 Act barred a suit by seven administrative employees against an international organization for breach of their contracts of employment.

In cases not involving employment, the lower courts are divided in their approach to the new statute -- some interpreting the grant of

immunity narrowly, as Congress intended,[4/] and some treating the exceptions narrowly.[5/] A striking example of the latter approach is International Ass'n of Machinists v. Organization of Petroleum Exporting Countries, 477 F.Supp. 553 (S.D. Cal. C.D. 1979), in which a labor union sued OPEC and its 13 member nations, alleging that their price-setting activities violated Section 1 of the Sherman Anti-Trust Act, 15 U.S.C. Sec. 1. District Judge Andrew Hauk dismissed the complaint on a number of independent grounds, one of which was sovereign immunity. A reading of this part of his opinion strongly suggests that

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4/ National American Corp. v. Federal Republic of Nigeria, 448 F.Supp. 622 (S.D.N.Y. 1978); Outboard Marine Corp. v. Pezetel, 461 F.Supp. 384 (D.C. Del. 1978). See also Sugarman v. Aeromexico, supra.

5/ Yessenin-Volpin v. Novosti Press Agency, 443 F.Supp. 849 (D.C. S.D.N.Y. 1978); International Ass'n of Machinists v. Organization of Petroleum Exporting Countries, 443 F.Supp. 553 (S.D. Cal. C.D. 1979).

it would virtually nullify Section 1605(a)(2). There is nothing in the history of the FSIA to support Judge Hauk's ruling that "this 'commercial activity' should be defined narrowly" (477 F.Supp. at 567). On the contrary, as we have shown, the purpose of the statute was to adopt the "restrictive" doctrine of sovereign immunity. Manifestly, that requires narrow treatment of the immunity rather than the exception.[6/]

Misapplication of the 1976 Act in This Case

The activity challenged by the complaint in this case involved employment, not of civil servants or diplomatic or military personnel, but

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6/ In any case, this part of the IAM decision is distinguishable because of the ground on which it rests. The Judge found that the price-fixing activities of the various countries were an aspect of their control of their natural resources, an activity "in which only a sovereign can engage," 477 F.Supp. at 567, and he held that that was the decisive test under the exception for commercial activity. The same cannot be said for operating a university which can be, and usually is, done by non-governmental entities.

of university faculty. Recruitment of that faculty through advertisements in American newspapers and circulation in the State of New York of a religiously discriminatory application form was a preliminary step leading to a transaction involving the exchange of services for cash. Petitioners submit that this constitutes commercial or private activity within the scope of the concept or jure gestionis.

The adoption of the restrictive version of the sovereign immunity doctrine, first by the State Department and then by Congress, was prompted by the belief that "the widespread and increasing practice on the part of governments of engaging in commercial activities makes necessary a practice which will enable persons doing business with them to have their rights determined by the courts" (Tate Letter, p. 985). One of the ways in which governments all over the world have been expanding their activities is the

development of cultural institutions, such as universities. This kind of activity necessarily entails relations with other nations, particularly in the recruitment of personnel. These new forms of governmental endeavor, we submit, are not within the concept of jure imperii to which the Tate Letter and the Act confined the defense of sovereign immunity.

Recruitment of university staff is a "private" activity, as that term is used in the House Report, supra, since it is frequently engaged in by nongovernmental bodies. It is an "act which can be done by an individual," to use von Mehren's formulation, supra. It is not an activity "in which only a sovereign can engage," the test applied in the IAM case, supra.

CONCLUSION

Our country can be embarrassed not only by undue interference with the central operations of

a foreign state but also by allowing such states to conduct commercial and other private activities within our borders in violation of laws designed to protect the rights of our citizens. It is that kind of embarrassment that is curbed by the restrictive immunity rule.

The theory apparently applied by the Division and accepted by the court below would revive the situation in which our citizens are left without remedy when foreign states invade their rights. Under that theory any government could legally advertise -- for employees, consultants, contractors, etc. -- and specify publicly that Jews or Blacks or any other group would not be accepted. The difficulties such a situation would create for our government, both here and abroad, would certainly be greater than those flowing from enforcement at home of our anti-bias laws against foreign universities, including those that may be publicly owned. We submit that

agencies of foreign sovereigns operating in this country should not be permitted to flout antidiscrimination laws that are basic to our legal and political system.

More broadly, the ruling below may lead to serious misunderstandings here and abroad with respect to how American courts will resolve immunity questions. Moreover, an injustice has been done to the petitioners who have been deprived of the single forum where their claim might be tried and their rights vindicated. Certainly, it cannot be said that the Division and the court interpreted the 1976 Act so as, in President Ford's words, to

> make it easier for our citizens ... to turn to the courts to resolve ordinary legal disputes.

For these reasons, we respectfully urge this Court to grant the Petition for Writ of Certiorari.

Respectfully submitted,

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September 1980

APPENDIX

Determination and Order of Human Rights Division

NEW YORK STATE: EXECUTIVE DEPARTMENT
DIVISION OF HUMAN RIGHTS

COMPLAINANT AMERICAN JEWISH CONGRESS AND MARTIN HOCHBAUM, Ph.D. VS. UNITED ARAB EMIRATES, THE CULTURAL DIVISION OF THE EMBASSY OF THE UNITED ARAB EMIRATES AND UNITED ARAB EMIRATES UNIVERSITY RESPONDENT	Case No. Ia-E-C-6019-78 E-C-58284-78

DETERMINATION AND ORDER AFTER INVESTIGATION

On May 18, 1978, American Jewish Congress & Martin Hochbaum, Ph.D. filed a verified complaint with the State Division of Human Rights charging the above-named respondent(s) with an unlawful

discriminatory practice relating to employment because of creed in violation of the Human Rights Law of the State of New York.

Pursuant to Section 297.2 of the Law, the State Division of Human Rights hereby determines that it does not have jurisdiction in this matter for the following reason:

The complaint herein is directed against a foreign State, its embassy and State owned University not engaged in commercial activity within the United States.

This complaint is therefore ordered dismissed, and the file is closed.

"ANY PARTY TO THIS PROCEEDING MAY APPEAL THIS ORDER TO THE STATE HUMAN RIGHTS APPEAL BOARD BY FILING WITH THE BOARD A WRITTEN NOTICE OF APPEAL WITHIN (15) DAYS AFTER SERVICE OF THIS ORDER. THE NOTICE OF APPEAL MUST BE FILED BY MAIL OR IN PERSON AT THE OFFICE OF THE STATE HUMAN RIGHTS APPEAL BOARD, ROOM 8234, TWO WORLD

TRADE CENTER, NEW YORK, N.Y. 10047. DO NOT FILE THE NOTICE OF APPEAL WITH THE STATE DIVISION OF HUMAN RIGHTS. THE DIVISION AND THE BOARD ARE SEPARATE AGENCIES. A NOTICE OF APPEAL DELIVERED TO OR RECEIVED BY THE DIVISION, OR ANY AGENCY OTHER THAN THE BOARD, SHALL BE DEEMED IMPROPERLY FILED AND SHALL BE DISMISSED BY THE BOARD."

DATED: & Mailed: June 11, 1979.

STATE DIVISION OF HUMAN RIGHTS

By: /s/ George C. Findlay
George C. Findlay
Regional Director

Order and Decision of
Human Rights Appeal Board

STATE OF NEW YORK: EXECUTIVE DEPARTMENT
STATE HUMAN RIGHTS APPEAL BOARD

ORDER

AMERICAN JEWISH CONGRESS and
MARTIN HOCHBAUM, Ph.D.,

Case No.
E-C-58284-78

COMPLAINANT-APPELLANT

APPEAL NO.
5866

vs.

UNITED ARAB EMIRATES, THE CULTURAL
DIVISION OF THE EMBASSY OF THE
UNITED ARAB EMIRATES and THE
UNITED ARAB EMIRATES UNIVERSITY,

RESPONDENTS

The above-captioned complaint having been filed with the Division of Human Rights on May 18, 1978 and the Division having rendered its Determination and Order on June 11, 1979 from which appellant filed a timely appeal with the Board, and

The majority of the Board, without having reached the merits on other issues on appeal, having decided that the Division has unreasonably exceeded the extended statutory time limit of 180 days from the filing date of the instant complaint to the date of the final Order and Determination after Investigation, and

The Board having decided that non-adherence to the prescibed time limit by the Division is in violation of the statutory restraints imposed by Section 297.2 of the Human Rights Law as amended on August 5, 1977, and

The Board having determined that the Order appealed from was not made in accordance with procedural time limits required by law pursuant to Section 297.a.7.c. and that the resulting administrative delay requires statutory dismissal of the complaint herein, it is

ORDERED that the Order of the Division after Investigation herein be and the same hereby is

annulled on the law and the instant complaint is dismissed in all respects.

STATE HUMAN RIGHTS APPEAL BOARD

By /s/Irma Vidal Santaella
Irma Vidal Santaella
Chairman

Dated & Mailed: August 7, 1979

STATE OF NEW YORK: EXECUTIVE DEPARTMENT
STATE HUMAN RIGHTS APPEAL BOARD

DECISION

AMERICAN JEWISH CONGRESS and MARTIN HOCHBAUM, Ph.D.,

Case No. E-C-58284-78

COMPLAINANT-APPELLANT

vs.

APPEAL NO. 5866

UNITED ARAB EMIRATES, THE CULTURAL DIVISION OF THE EMBASSY OF THE UNITED ARAB EMIRATES and THE UNITED ARAB EMIRATES UNIVERSITY,

RESPONDENTS

Before going into the merits of the Order appealed from this Board is legally mandated, within its very limited powers, to review the procedures followed by the Division in the implementation of the provisions of the Human Rights Law (State Division of Human Rights on the complaint of Martha Valdemarsen v. Genesee Hospital, 411 N.Y.S.2d 748; Section 297.a.7.c).

Here, the instant complaint was filed with the Division after August 6, 1977. The applicable section of the law as amended on that date reads in part:

Section 297.2

> "...Within one hundred eighty days after a complaint is filed, the division shall determine whether it has jurisdiction, and, if so, whether there is probable cause to believe that the person named in the complaint, hereinafter referred to as the respondent, has engaged or is engaging in an unlawful discriminatory practice. If it finds with respect to any respondent that it lacks jurisdiction or that probable cause does not exist, the commissioner shall issue and cause to be served on the complaint an order dismissing such allegations of the said complaint as to such respondent." (emphasis added)

The administrative delay of the Division in the implementation of the provisions of the Human Rights Law on the above-captioned unreasonably exceeded the above-cited time limits.

Prior to June 9, 1977 the Board allowed protracted delays by the Division in the implementation of the provisions of the then existing

Section 297 even in the submission of the Division's record on which appeals are based in order to protect the rights of innocent parties. However, on that date the Court of Appeals affirmed the landmark decision of the Appellate Division, 4th Department in the Matter of State Div. of Human Rights v. Board of Educ. of West Val. Cent. School Dist., 53 A.D.2d 1043, 386 N.Y.S.2d 166, affd, 42 N.Y.2d 862, 297 N.Y.S.2d 791, for protracted administrative delays.

Two months later, the Legislature amended Section 297 precisely to prevent such delays by the Board and/or the Division by eliminating all uncertainties as to the time periods within which each agency must act. The amendment imposed a mandatory 270-day time limit on the Board for the very first time. Senate Bill 6777-A substantially enlarged the unrealistic short procedural periods of time in which the Division had to proceed under the then existing 297-directory

periods. The Senate debate on Bill 6777-A clearly indicates the legislative intent was to impose mandatory time restraints on the Division and to require dismissal of the complaint for non-adherence to the extended time limits.

We agree with the Courts and Legislature as, indeed, it is a travesty of justice whenever the human and statutory rights of innocent parties are trampled upon, jeopardized and prejudiced by the very agencies and public servants entrusted with their enforcement and protection. This Board has strictly adhered to the time restraint imposed on it since August 5, 1977.

Notwithstanding, this Board is fully aware that delays by the Division in the submission of requested records to the Board pursuant to Section 297.a.6.e. or delays in the implementation of 297 procedural time limits by the Division are grossly unfair to the innocent complainant who invokes the statutory jurisdiction of the

Division for the protection of his or her human rights. Undue delays are also unfair to the named respondent who may be stigmatized with charges of unlawful discrimination and is deprived of the right to swift adjudication one way or the other.

Thus, minor administrative delays of a few days by the Division in excess of the extended time limits prescribed by Section 297.2 should not operate to foreclose relief to innocent parties. Such relatively minor delays do not defeat the intent of reasonableness built in the amended statute.

As a human rights forum, this Board belives that minor delays measured in terms of a few days do not warrant the annulment of an order of the Division appealed from nor the statutory dismissal of the complaint. Justice and the public interest require no less.

But here that is not the case as the delay by the Division is by no means a matter of a few days.

Here the procedural time period applicable to the above-captioned matter amounted to a maximum of 180 days from the date of the filing of the complaint to the date of its final determination by the Division. Although the time variance from the procedural time limit may seem small at first blush the resultant delay of over 30 days in excess of the extended time limit is by no means minor.

In the instant matter more than 211 days elapsed from the date of the filing of the complaint to the date of the final Determination and Order of the Division after Investigation.

It is beyond dispute that the Division exceeded the maximum statutory time limit of 180 days in the implementation of the above-cited section of the law. The failure of the Division

is in violation of Section 297 and is fatal as it requires the statutory dismisal of the instant complaint.

Consequently, this Board, without reaching into the merits is constrained to comply with Section 297.a.7.c. as the Order appealed from is not made in accordance with statutory procedures and it should be annulled and the complaint dismissed.

/s/ Irma Vidal Santaella
Irma Vidal Santaella

Dated & Mailed: August 7, 1979

ALL MEMBERS CONCUR

Order of Appellate Division

At a term of the Appellate Division of the Supreme Court held in and for the First Judicial Department in the County of New York, on January 17, 1980

Present: Hon. Harold Birns, Justice Presiding
Arnold L. Fein
Joseph P. Sullivan
Vincent A. Lupiano
J. Robert Lynch, Justices

American Jewish Congress and Martin Hochbaum, Ph.D.,

Petitioners,

-against-

State Human Rights Appeal Board, State Division of Human Rights, United Arab Emirates, The Cultural Division of the Embassy of The United Arab Emirates, and The United Arab Emirates University

Respondents.

7187
[M-4634]

The above-named petitioners having presented a petition to this Court praying for an order,

pursuant to Section 298 of the Executive Law, setting aside and annulling the determination of the State Human Rights Appeal Board dated August 7, 1979, which annulled the order of the State Division of Human Rights made on June 11, 1979 dismissing petitioner's complaint for lack of jurisdiction, and dismissed the complaint pursuant to Section 297.2 of the Human Rights Law,

And said proceeding having been argued by Mr. Joseph B. Robison of counsel for petitioners, and by Mr. Robert J. Elliott of counsel for respondent Embassy of The United Arab Emirates; and due deliberation having been had thereon,

It is unanimously ordered that the determination of the State Human Rights Appeal Board be and the same hereby is confirmed, on the merits, without costs and without disbursements. See Matter of Callaghan v. New York State Division of

Human Rights,. A D 2d (1st Department, Oct. 1979).

ENTER:

JOSEPH J. LUCCHI

Clerk.

Order of Court of Appeals

Mo. No. 497
In the Matter of

American Jewish Congress and Martin Hochbaum, Ph.D.,

Appellants,

vs.

State Human Rights Appeal Board, State Division of Human Rights, United Arab Emirates, et al.,

Respondents.

Motion for leave to appeal denied.

June 16, 1980